

Joint Committee on Boards, Commissions and Consumer
Protection

**BACKGROUND PAPER FOR
HEARING
JANUARY 4, 2005
BOARD OF BEHAVIORAL
SCIENCES**

BACKGROUND, IDENTIFIED ISSUES, AND QUESTIONS

**BRIEF OVERVIEW OF BEHAVIORAL SCIENCES
PROFESSION AND THE BOARD OF BEHAVIORAL
SCIENCES**

The Board of Behavioral Sciences (Board) within the Department of Consumer Affairs (DCA) regulates professionals who generally perform counseling services, but are not registered psychologists or psychiatrists. The Board has three categories of licensees: Marriage and Family Therapists (MFTs); Licensed Clinical Social Workers (LCSWs); and Licensed Educational Psychologists (LEPs).

California became the first state to register social workers when, on July 18, 1945, Governor Earl Warren signed legislation creating the Board of Social Work Examiners.¹ The new Board was placed within the Department of Professional and Vocational Standards, and consisted of seven members appointed by the Governor and approved by the State Senate. The law required that at least two Board members be from the public and at least four be social workers with five years professional experience and a year of graduate work. By late 1945, the Governor had finished appointing the first Board.

This same legislation included provisions to grandfather in social workers already employed in California from September 1945 to the end of December 1946. During those 16 months, 4,233 social workers filed applications for registration and 4,098 were issued

¹ This description is taken, in large part, from the Board's Sunset Review Report. For more detailed information, refer to that report's much more extensive discussion.

certificates. Certification was intended to identify competent professionals who were working for higher standards and better service to the public.

The Board's duty of registering social workers remained relatively unchanged until the 1960s. In late 1962, the Assembly began investigating fraudulent practice in marriage counseling. In part because of that investigation, the Marriage, Family, and Child Counselor Act was enacted in 1963. Under the Act, the Board was given the additional responsibility of licensing and regulating Marriage, Family, and Child Counselors. Soon after, the Act was renamed the Social Worker and Marriage Counselor Act and the Board was accordingly renamed the Social Worker and Marriage Counselor Qualifications Board.

In 1967, the Board began administering a new Licensed Clinical Social Worker Program, and after 1969 anyone who wanted to practice clinical social work in California was required to hold a license. In 1970, a licensing program for educational psychologists was added and the Board became known as the Board of Behavioral Science Examiners. At that time, the Board expanded to its present membership of six public members; two Marriage, Family and Child Counselors; two LCSWs; and one Licensed Educational Psychologist.

On January 1, 1997, the name of the Board was officially changed to the "Board of Behavioral Sciences" in order to more clearly represent its functions, which extend beyond administering examinations.

The mission of the Board is to protect consumers by establishing and maintaining standards for competent and ethical behavior by the professionals under its jurisdiction.

In addition to MFTs, LCSWs and LEPs, the Board registers MFT interns (IMFs), Associate Clinical Social Workers (ASWs), and continuing education providers (PCEs). The Board develops and administers written examinations for its licensing programs, administers a continuing education program for professional competency, develops regulatory standards, and conducts an enforcement program to investigate consumer complaints. It imposes disciplinary action against licensees and registrants who violate the law.

Since 1970, the Board has been composed of 11 members – six public members, two LCSWs, one LEP and two MFTs. Nine members are appointed by the Governor, one public member is appointed by the Speaker of the Assembly, and one public member is appointed by the Senate Rules Committee.

BOARD MEMBER	APPOINTED BY	POSITION	TERM
Catherine Kay (Chair)	Governor	Public Member	5/02 to 6/1/05
Robert Gerst	Governor	Public Member	3/03 to 5/1/06
Victor F. Law	Assembly	Public Member	11/03 to 6/1/07
Glynis Morrow	Governor	Public Member	9/01 to 6/1/05
Howard Stein	Senate	Public	9/99 to 6/1/07

Vacant	Governor	Public	6/1/07
Vacant	Governor	LEP	6/1/08
Peter Manoleas	Governor	LCSW	6/02 to 6/1/06
Susan Ulevitch	Governor	LCSW	9/01 to 6/1/06
Jane Nathanson	Governor	MFT	5/02 to 6/1/05
Karen B. Pines	Governor	MFT	8/99 to 6/1/06

PRIOR SUNSET REVIEW

The Board was last reviewed in 1997. According to the Board, it has made a number of changes since that review:

- Created a Strategic Plan.
- Established a Local Area Network, enhancing internal communication and automation.
- BBS Website – The Board’s website, www.bbs.ca.gov, which went live July 1996, currently receives an average of 190,000 hits a month.
- Online License Verification – In June 1999, the Board began providing the public with online license verification for those individuals it licenses and regulates. According to the Board, this “license lookup” system has been received very favorably, and ranks consistently in the top 5 website hits at the Board’s website each month.
- Filing Complaints Online - In June 2003, the Board’s website was enhanced to provide the ability to file consumer complaints online. Since it became operational, approximately 250 complaints have been submitted through the online process. The Board also added a feature where an individual can file a complaint against the Board itself as an agency.
- Licensing and Examination Program
 - LiveScan Process for Fingerprinting – In August 2000, the Board implemented Live Scan procedures for fingerprinting applicants seeking licensure. With this new technology, the Department of Justice can notify the Board of results within one week if no prior criminal record is found. According to the Board, this represents a significant improvement to the one to three month turnaround time for the paper-based fingerprint system. For applicants completing the fingerprint process outside of California, where Live Scan is not available, the paper-based system is still accepted.
 - Reporting Criminal Convictions at the time of License Renewal – In January 2001, the Board implemented a new requirement that all licensees

must disclose on their renewal application any plea of nolo contendere to any misdemeanor or felony, or disciplinary action taken by any regulatory or licensing board in this or any other state subsequent to their last renewal.

- Oral Examination Replaced – At its November 2003 meeting, the Board voted to replace the Oral examination with a Written Clinical Vignette examination. This affected both LCSW and MFT candidates.
- Implementation of Citation and Fines – In February 1997, the Board's citation and fine program was implemented as an alternative to the disciplinary action process for certain violations of the Board's laws and regulations. As of June 30, 2004, 82 citations have been issued.
- Federal Reporting Mandate Implemented – In 2000, the Federal Office of the Inspector General implemented a new federal mandate requiring reporting of disciplinary actions against healthcare professionals to a national data bank, the Health Integrity and Protection Data Bank (HIPDB). The Board reports disciplinary action it imposes to this data bank.
- Legislative and Regulatory Improvements – A number of relevant legislative and regulatory changes have been enacted since the last sunset review. These changes are listed in chronological order:
 - Committee Legislation (SB 1983) – Revised and enhanced the experience requirements as well as increased collaborative efforts between the Board and the schools of social work. This legislation became effective January 1, 1999.
 - Inactive License (SB 2238) – Allows a licensee who is currently not practicing the option of placing their license on an inactive status. An inactive status permits a licensee to pay a lesser fee and not be required to comply with the continuing education requirement until they wish to reactivate their license and commence practicing. This legislation became effective January 1, 1999.
 - Identification of all Fees Collected by the Board and Reduction of Registration and Inactive Fees (CCR Sections 1816, 1816.1, 1816.2, 1816.3, 1816.4, 1816.5, 1816.6, and 1816.7) – Pursuant to SB 2238, the Board promulgated regulations to identify all the fees collected in one article of the regulations, reduced the registration fees for registration and renewal of the MFT registration and ACSWs from \$90.00 to \$75.00, and reduced the inactive fees to half the active renewal fee. These regulations became effective January 8, 1999.

- Supervision Training for Marriage and Family Therapist Supervisors (CCR Section 1833.1) – This regulation amendment specified the requirement of six hours of supervision training every two years to be completed by a licensed individual in order for that individual to qualify as a supervisor. This addition has increased a supervisor’s knowledge of the necessary components needed to supervise unlicensed individuals effectively. This regulation became effective January 21, 1999.
- Requirements for Associate Clinical Social Worker Supervisors (CCR Section 1870) – As a result of SB 1983 above, the Board and the schools of social work worked together to create comprehensive regulations addressing the responsibilities of supervisors of ACSWs. This regulation clearly delineates the necessary involvement and knowledge of a supervisor. This regulation became effective May 10, 1999.
- Supervisory Plan (CCR 1870.1) – Also included in the legislation resulting from the Committee’s sunset review process was the requirement for the supervisor and supervisee to create a supervisory plan describing the goals and objectives of supervision. This regulation became effective May 11, 1999.
- Marriage, Family and Child Counselor Name Change to Marriage and Family Therapist (AB1449) – Reflected that any reference in any statute or regulation to “licensed marriage, family and child counselor” or “marriage, family and child counselor” shall be deemed a reference to “Marriage and Family Therapist.” This legislation became effective July 1, 1999.
- Statute of Limitations (SB 809) – This legislation placed time frames on the Board for pursuing disciplinary action for accusations filed on and after January 1, 2000. This legislation became effective January 1, 2000.
- MFT and LCSW Corporations Discontinued (AB 1667) – This legislation discontinued registering MFT and LCSW corporations. These corporations are required to file their articles of incorporation with the California Secretary of State. This legislation became effective on January 1, 2000.
- Reduction of Biennial License Renewal Fees, Delinquent Fees, and Inactive License Fees (CCR Sections 1816, 1816.6, and 1816.7) – B&P Code Section 4994.1 directs the Board to reduce fees accordingly when funds are redeposited into the Behavioral Sciences Fund pursuant to the 1991 Budget Act. In 1997 the Legislature redeposited funds, and as a result the Board promulgated regulations to reduce fees. These fee reductions provided a cost savings to licensees. These regulation amendments became effective July 25, 2000.

- LCSW Experience Gained Outside of California (SB 1554) – This legislation enacted requirements for individuals who apply for licensure as an LCSW with education and experience gained in another state and for those who hold a valid license in another state. This statute has benefited those applying from another state by clearly delineating the necessary documentation and additional courses needed. This legislation became effective January 1, 2001.
- Require Continuing Education in Law and Ethics (CCR Section 1887.3) – Because a majority of disciplinary actions related to ethical and legal violations, the Board initiated a continuing education requirement of six hours of training in law and ethics every two years. The regulation amendments mandating such education became effective December 4, 2001.
- Marriage, Family, and Child Counselor Name Change and Clarification of Acceptance of Out of Country Degrees (SB 2026) – This legislation primarily changed the license title name from “marriage, family, and child” counselor to “marriage and family therapist” throughout the laws that relate to the practice.
- Licensed Mental Health Service Provider Education Program (AB 938) – This legislation was developed in an effort to address the current shortage of mental health service providers. It established the Licensed Mental Health Service Provider Education Program. To partially fund this effort, AB 938 amended Sections 4984.75 and 4996.55 of the B&P Code to require an additional ten-dollar fee at the time of license renewal for MFTs and LCSWs. This additional fee does not go into the Board’s fund, but is instead transferred into the Mental Health Practitioner Education Fund. The program provides grants to licensed mental health service providers who provide direct patient care in a publicly funded facility or a mental health professional shortage area. This legislation became effective September 20, 2003.
- Acceptance of Online Courses for Completing the Continuing Education Requirement (CCR Section 1887) – This regulation allows licensees to obtain all 36 hours of required continuing education through distance learning and interactive means (e.g. internet courses).
- Additional Pre-Licensed and Licensed Continuing Education Training (SB 564) – This legislation requires that pre-licensed individuals complete a 15 hour course in spousal and partner abuse detection, assessment, and intervention strategies and that licensees complete a course in this subject during their first renewal period after the January 1, 2004 operative date.

- Continuing Education Hours Needed for Reactivation of License During Certain Time Periods, Deleting Specification of Settings for Gaining Experience and Enhancing Qualifying Experience, and Increasing Hours Gained Under Other Disciplines (SB 1077) – This legislation made several amendments to the sections of law that relate to MFT and LCSWs by allowing a MFT intern to apply hours of experience gained under separate registrations toward the requirements for licensure and specifying the number of continuing education hours required for reactivation from inactive to active status within a renewal period. It also deletes the specific settings in which MFT trainees, interns, and associate CSWs gain experience, further elaborates on the experience to be gained, clarifies setting responsibilities (thereby allowing associate CSWs to gain additional hours of experience under a licensed mental health professional acceptable to the Board), specifies a required amount of supervision that associates must gain under a LCSW, and restructures the experience sections of the law. This legislation became effective January 1, 2004.
- Additional Pre-Licensed and Licensed Continuing Education Training (SB 953) – This legislation requires that pre-licensed individuals complete a minimum of 10 hours of coursework in aging and long term care and that licensees complete a three hour course in this subject. The Board is in the process of pursuing legislation to further clarify the legislative intent of requiring that all licensees complete this required continuing education coursework during their first renewal period after January 1, 2005.

NEW ISSUES

ISSUE #1: Whether the state should continue to regulate the profession of Behavioral Sciences.

Issue #1 question for the Board and DCA: *Is there a continuing need to regulate the profession of Behavioral Sciences?*

Background: The public is entitled to demand that mental health professionals such as those regulated by the Board follow the highest standards of behavior and are competent to engage in their sensitive and complex profession. For example, licensees are often called to intervene in situations that directly affect consumers when they are in their most vulnerable state, they provide service to those traumatized by catastrophes, and as well provide services to those who have participate in programs related to child protective services, juvenile courts, schools, prisons, and adult/child abuse agencies.

Because of the possibility of serious and enduring harm to clients, the public expects that mental health professionals be regulated, monitored, and held accountable for any type of substandard practice. Because mental health professionals have access to highly

confidential client information, the public expects that regulatory authorities will remove dishonest or incompetent practitioners.

ISSUE #2: Whether the Board should allow licensees to fulfill all 36 hours of Continuing Education (CE) through only self-study.

Issue #2 question for the Board: *Has the Board permitted the convenience of licensees to override the potential for abuse by licensees in its rule permitting licensees to fulfill all 36 hours of the CE requirement in online activities?*

Background: The Board permits licensees to obtain all 36 hours of their CE by visiting internet sites, accessed remotely from their home or other location. They then need only certify to the Board that they have done this, without any further proof, and the Board does not do any additional auditing of these licensees' certifications, beyond the auditing it does for all participatory CE courses.

This means of fulfilling CE is, of course, highly convenient for licensees, and takes full advantage of the internet's interactive technology. As of October, 2004, the Board listed 63 different internet sites that can be used for CE courses.

There are two potential problems with this. First, is there a greater potential for licensees to abuse this method of fulfilling CE? While it is plainly no harder for a licensee falsely to claim he has attended classes than it is to claim he has interacted with an internet site, there are, at least, greater risks to such false claims if other people are present and can be asked. Further, there are attendance lists of such courses that can be verified.

Second, in a profession that so heavily depends on human interaction, is it entirely appropriate that licensees be permitted to fulfill all of their CE requirements while sitting alone at home? There is certainly some value in requiring licensees to take advantage of internet technology for some of their CE, but a rule permitting licensees to take no courses in which other students – and an instructor of some kind – will be present for active, in-person demonstrations, may be considered excessive.

If it is appropriate for licensees to fulfill all of their CE requirements by themselves, is there a consequent obligation for the Board to take additional efforts to confirm that licensees who have taken advantage of this form of CE are, in fact, providing accurate information to the Board? At present, the Board simply accepts the word of any licensee that they have completed their CE. When some of those requirements are met through in-person classes, seminars, etc., there is some additional assurance that the Board's standards are, in fact, being met, should the Board decide to cross-check attendance lists, etc. However, when all 36 hours are completed without any other human being ever seeing the licensee, should the Board either do more aggressive auditing or engage in some other form of confirmation?

The Board says that it currently audits licensees CE requirements at random, and suggests that it would be “inappropriate” to “target” licensees in a “particular group.” This is certainly true if the “group” were based on inappropriate criteria, such as race or gender. However, given the greater potential for abuse of the online form of CE, it would hardly be irrational for the Board to pay special attention to those licensees who choose not to do any of their CE in settings that involve other people, and at the very least, to provide a somewhat higher level of scrutiny to the certifications made by this group of licensees.

ISSUE #3: Restitution – Whether the Board should have the authority to order restitution to consumers who have been seriously harmed by licensees.

Issue #3 question for the Board: *Is it appropriate for the Board to have authority to order restitution to consumers who have been harmed by licensees?*

Background: The Board does not, itself, have the ability to order restitution to consumers harmed by licensees. However, the Board does have authority to request such an order from a Superior Court. (B&P Code sec. 125.5 (b))

Restitution is a very particular kind of remedy. It is a form of equitable relief that (in the present context) would require a licensee who has harmed a consumer to return any unjust enrichment or benefit he has gained from the harm he caused. It is different from, for example, punitive damages designed to punish a licensee. In the earlier common law, restitution meant “the return or restoration of a specific thing or condition.” (Cal.Jur.3d, Restitution, sec.1, p. 398)

However, there is also a broader modern “understanding” of restitution, which could sweep in other forms of damages. As explained in California Jurisprudence 3d,

“In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another.” (Cal.Jur.3d, Restitution, sec. 1, p. 398)

This broader definition may seem to include a more typical understanding of general damages (such as lost wages) that would make the consumer whole. Such a definition would differ from the traditional understanding that restitution on restoring to the injured party a benefit that a wrongdoer might unjustly keep for himself.

B&P Code section 125.5 does not specify which of these definitions it intends, and no case precedent has apparently interpreted it. However, in light of the fact that restitution is the only form of monetary relief for victims specifically mentioned, it would appear that a strongly defensible reading of the term in that statute would include the broader definition; any other understanding might appear to leave a court without specific

authority to award any other kind of damages, and the narrowest definition could leave injured consumers without full redress in court.

Under either of these definitions, however, it would benefit the public if the Board itself had the legal authority to award monetary relief to harmed consumers directly. The Board should have a broad array of available measures of damages, from which it may pick and choose in fashioning the most appropriate remedy for a particular case. Indeed, the Board notes that it “may consider seeking restitution for the complainant when negotiating a stipulated agreement.” (*Board’s Response to Questions from Sunset Review Report*, p. 15) This is because it can negotiate settlement terms based on anything the licensee will agree to, whether listed in the Board’s statutory mandate or not.

When licensees will not agree to a settlement, however, it is in the Board’s interest to have the largest possible number of options available to it, in order to assure that all possible kinds of harm may be remedied. It may be considered illogical for the Board to have this authority as a contractual matter in settlements (due to the Board’s inherent power to settle cases on any terms agreeable to both parties), but lack the identical authority as part of its ordinary, statutory tools. For example, the State Contractors License Board has authority to make sure that “. . . all loss caused by the act or omission for which the license was revoked has been fully satisfied.” (B&P Code sec. 7102)

Moreover, particularly in light of the fragile nature of the consumers the Board deals with, requiring them to file an additional action in civil court to obtain restitution could appear unseemly or even cruel – particularly in light of the fact that the Board could include such an award as part of an already-pending action against the licensee if given the statutory authority. To the extent the Board might not feel such a charge in a particular case was appropriate, the Board could, of course, omit a request for restitution in that case.

ISSUE #4: Whether the public would benefit by being able to learn from a licensee search through the Board’s website of non-licensees who have been convicted of the unlicensed practice of psychology.

Issue #4 question for the Board and DCA: *Should the Board be given – or does it need -- statutory authority to post relevant information on its website to alert the public to non-licensees who have been convicted of the unlicensed practice of Behavioral Sciences?*

Background: When the public visits the Board’s website, they may search for information about Board licensees, and find out if they have any record of discipline or criminal violations related to the practice of behavioral science. Information about disciplinary actions related to specific licensees will show up when that licensee’s name is displayed.

In addition, the Board investigates instances of the unlicensed practice of behavioral science. However, since anyone practicing without a license is, by definition, not a licensee, they do not technically fall within the Board's jurisdiction. Therefore, if the Board finds adequate evidence of unlicensed practice, it must refer the case to a local District Attorney for prosecution.

Thus, it is possible that the current system may create unnecessary consumer confusion. Because the licensee lookup feature on the Board's website contains information about licensees, any member of the public who looked up the name of an unlicensed person on the Board's web site would be able to learn that that person does not have a license. However, the consumer would have no idea that the unlicensed person had already been convicted for unlicensed practice.

This problem is especially acute for those non-licensees who continue practice after a conviction.

There is no public policy reason to exclude those who have been convicted of unlicensed practice from the database of the Board with jurisdiction over that practice. And there are at least two sound reasons in favor of such inclusion.

First, this would be extremely relevant and important information for consumers who may have contact with such people. Few consumers who use the Board's license look-up feature would also do an additional search for convictions in the state's courts, though this information is publicly available. The Board is clearly in the best position to compile that information with the information it already has on its licensees. This is particularly true if the Board initiated the action against the unlicensed party.

Second, and perhaps even more important, the Board would benefit from this kind of posting. If someone is continuing to practice after having been convicted of unlicensed activity, consumers who would come into contact with that person would be ideally situated to let the Board know about the continuing activity of known wrongdoers. In effect, this sort of feature would allow affected consumers to be the Board's investigators. The names of those convicted of unlicensed practice could be displayed in a different color from licensees, with a flag to the consumer to report this person to the Board if they are continuing to practice without a license after a prior conviction.

The largest part of the problem is that for its license search function the Board uses the DCA search engine, and the DCA keeps only information about licensees, based on their license number. However, as noted above, there is no public policy reason to exclude from this database those who have already been convicted of unlicensed practice, and countervailing public policy reasons in favor of such inclusion. As with all technological advancements, this would require some creative work on the part of DCA's technology staff. There may also be ways to provide this information to consumers without having to use the DCA database. The Board has noted it might be possible, for example, to have a link on the page listing the results of a licensee search informing consumers that if the

person they are looking for is not listed, they can click the link to go to a page on the Board's website listing those convicted of unlicensed activity.

In light of the benefits to consumers, it should be well worth the time and effort to devise some solution to this problem.